Dr Rayanold Pereira v Minister of Labour, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3-25-109 OF 1994
NIK HASHIM JC
17 JUNE 1997

Labour Law *— Industrial Court — Discretion of Minister — Minister's discretion not to refer applicant's dispute to Industrial Court — Non-payment of salary and breach of mutual respect — Whether orders of certiorari and mandamus ought to be granted — Whether Minister was right in refusing to refer the dispute to the Industrial Court — Industrial Relations Act 1967 s 20(3)*

The applicant was employed by Klinik Samuel ('the second respondent') as an assistant to an obstetrician gynaecologist. He claimed that his salary for the month of March 1993 was withheld when he refused to take up a bank loan to repay the outstanding sum of a loan he took with a partner of the second respondent. The applicant further related an incident on 12 April 1993 when his instruction to a nurse on duty in the clinic was ignored and he was unable to examine his patient because his consultation room was occupied by another doctor who refused to vacate the room and who told the patient that the applicant was no longer working for the clinic.

On 15 April 1993, the applicant wrote a letter to the second respondent whereby he considered himself constructively dismissed without just cause or excuse and accordingly made representations to the Director General of Industrial Relations. Pursuant to a conciliation meeting, the Minister was notified that there was no likelihood of a settlement. The Minister decided not to refer the representations to the Industrial Court, hence the application for orders of certiorari and mandamus.

It was contended by learned counsel for the applicant that since there was no provision for a loan in the contract of service, the deduction of the applicant's salary by the second respondent amounted to a breach of contract of employment by the latter. Moreover, there was a breach of mutual respect in that another doctor was placed in the applicant's room. The issue before the court was whether the Minister was right in refusing to refer the dispute to the Industrial Court.

Held, allowing the application:

(1) In this case, the Minister's reply '... bahawa rayuan tuan tidak wajar dirujukkan ke Mahkamah Perusahaan' was his reason, albeit a short one, why he did not refer the case to the Industrial Court. His reason was that he did not consider the matter a fit and proper one to be referred (see p 370D–E); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 10 followed.

(2) Having regard to the special facts of this case, the Minister had acted upon an incorrect basis of fact thus vitiating his decision. The allegations of breach of contract of employment through the salary cut and the non-payment of salary were not without basis. Moreover, there was also a breach of mutual respect. The placing of another doctor in the applicant's room and the attitude of the nurse towards the applicant were examples of breach of mutual respect by or on behalf of the second respondent towards the applicant. This breach destroyed the relationship between them.

Thus, the non-payment of salary and breach of mutual respect were matters which the Minister should have taken into consideration and given sufficient weight to because they were relevant. Therefore, the application could not be said to be frivolous and vexatious. Furthermore, the reasons of the Minister did not disclose that he had directed his mind to those factors. In refusing to refer the representations to the Industrial Court, the Minister had overstepped the limit of his discretion and thereby had exceeded his jurisdiction. Therefore, orders of certiorari and mandamus ought to be granted (see pp 370F–I and 371A–E); *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 followed.

[Bahasa Malaysia summary

Pemohon digaji oleh Klinik Samuel ('penentang kedua') sebagai pembantu kepada obstetrisian ginekologi. Beliau mendakwa bahawa gajinya untuk bulan Mac 1993 telah ditahan apabila beliau enggan mengambil pinjaman bank untuk membayar balik jumlah pinjaman yang belum dijelaskan yang diambil daripada rakan kongsi penentang kedua. Pemohon seterusnya menceritakan peristiwa yang berlaku pada 12 April 1993 apabila arahannya kepada jururawat bertugas di klinik itu tidak diendahkan dan beliau tidak dapat memeriksa pesakitnya kerana bilik rundingannya digunakan oleh doktor lain yang enggan mengosongkan bilik itu dan memberitahu pesakit itu bahawa pemohon tidak lagi bekerja di klinik itu.

Pada 15 April 1993, Pemohon menulis surat kepada penentang kedua di mana beliau menganggap dirinya dipecat secara konstruktif tanpa sebab atau alasan yang adil dan dengan itu membuat representasi kepada Ketua Pengarah Perhubungan Perindustrian. Berikutan daripada mesyuarat perdamaian, Menteri diberitahu bahawa tidak terdapat kemungkinan untuk penyelesaian. Menteri mengambil keputusan untuk tidak merujuk representasi itu ke Mahkamah Perusahaan, oleh itu permohonan untuk perintah-perintah certiorari dan mandamus.

Adalah dihujahkan oleh peguam pemohon bahawa oleh kerana tiada peruntukan untuk pinjaman dalam kontrak perkhidmatan, penolakan gaji pemohon oleh penentang kedua sama seperti pelanggaran kontrak pekerjaan oleh penentang kedua. Tambahan

pula, terdapat pelanggaran sifat saling menghormati di mana doktor lain ditempatkan di bilik pemohon. Isu di hadapan mahkamah adalah sama ada Menteri adalah betul dalam menolak untuk merujuk pertikaian itu ke Mahkamah Perusahaan.

Diputuskan, membenarkan permohonan:

(1) Dalam kes ini, jawapan Menteri '... bahawa rayuan tuan tidak wajar dirujukkan ke Mahkamah Perusahaan' adalah alasannya, walaupun ringkas, mengapa beliau tidak merujuk kes itu ke Mahkamah Perusahaan. Alasannya adalah beliau tidak fikir perkara itu wajar dan betul untuk dirujukkan (lihat ms 370D–E); *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 10 diikut.

(2) Setelah mengambil kira fakta-fakta istimewa kes ini, Menteri telah bertindak atas asas fakta yang salah dengan itu menjadikan keputusannya tidak sah. Pengataan pelanggaran kontrak pekerjaan melalui potongan gaji dan gaji yang tidak dibayar bukannya tanpa asas. Tambahan pula, terdapat pelanggaran sifat saling menghormati. Penempatan doktor lain di bilik pemohon dan sikap jururawat terhadap pemohon adalah contoh pelanggaran sifat saling menghormati oleh atau bagi pihak penentang kedua terhadap pemohon. Pelanggaran ini memusnahkan hubungan di antara mereka.

Oleh itu, gaji yang tidak dibayar dan pelanggaran sifat saling menghormati adalah perkara-perkara yang Menteri sepatutnya telah mengambil kira dan diberi pertimbangan sewajarnya kerana mereka adalah relevan. Oleh itu permohonan itu tidak boleh dikatakan remeh dan menyusahkan. Tambahan pula, alasan Menteri tidak menunjukkan bahawa beliau telah mengarahkan fikirannya kepada faktor-faktor itu. Dengan menolak untuk merujuk representasi itu ke Mahkamah Perusahaan, Menteri telah melampaui had budi bicaranya dan dengan itu telah melampaui bidang kuasanya. Oleh itu, perintah-perintah certiorari dan mandamus patut diberikan (lihat ms 370F–I dan 371A–E); *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 dan *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 diikut.

Notes

For the exercise of discretion and reference by the Minister, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 938–939 and 984.

Cases referred to

Adam v Charles Zub Associates Ltd [1978] IRLR 551 (refd)
Hanlon v Allied Breweries (UK) Ltd [1975] IRLR 321 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (folld)
Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337 (folld)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 10 (folld)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

S Shanker (*P Kuppusamy & Co*) for the applicant.
Al Baishah bte Hj Abdul Rahman (Senior Federal Counsel) for the first respondent.
P Soogumaran (*Shan Selvam & Soogu*) for the second respondent.

Nik Hashim JC: Dr Rayanold Pereira ('the applicant') was employed by Klinik Samuel ('the second respondent') as an assistant to an obstetrician gynaecologist on 1 April 1989 at a salary of RM3,500 per month. He claimed that he was given an interest-free loan of RM30,000 by Dr Samuel, a partner of the second respondent, to purchase a house belonging to Dr Samuel's uncle. The applicant paid the loan and by July 1992 the outstanding balance was about RM14,000. Dr Samuel suggested to the applicant that he take a bank loan of RM20,000 (to cover the outstanding sum plus interest) but this was rejected by the applicant. Dr Samuel wrote a letter to the bank whereby he cancelled the standing instruction to stop payment of salary into the applicant's account. The applicant's salary for the month of March 1993 was not paid by the second respondent. The applicant further claimed that on 12 April 1993, a patient insisted on seeing him. At the clinic, the nurse on duty ignored the applicant's instruction to take out the patient's medical card, forcing the applicant to use an empty card instead. The applicant was unable to examine the patient in his consultation room because the room was occupied by another doctor by the name of Dr Jasbir Virik, who refused to vacate the room. Dr Jasbir Virik told the patient that the applicant was no more working for the clinic and he examined the patient again.

On 15 April 1993, the applicant wrote a letter to the second respondent whereby he considered himself constructively dismissed without just cause or excuse and accordingly made representations to the Director General of Industrial Relations. Pursuant to a conciliation meeting held by the Director General, the Director General notified the Minister that there was no likelihood of a settlement. The Minister decided not to refer the representations to the Industrial Court. Hence this application for orders of certiorari and mandamus.

Learned counsel for the applicant contended that since there was no provision for a loan in the contract of service, the deduction of the applicant's salary by the second respondent amounted to a breach of contract of employment by the latter. Moreover, there was a breach of mutual respect in that another doctor was placed in the applicant's room. Since the Minister did not state his reasons for not referring the matter to the Industrial Court, the Minister could not be said to have considered whether the application was frivolous or vexatious. Therefore, the Minister had acted unreasonably when he refused to make references to the Industrial Court.

On the other hand, both the respondents submitted in effect that there was no issue of dismissal involved in this case. The deduction of salary was not a breach of the terms of the contract of employment. The Minister had exercised his discretion correctly when he refused to refer the case to the Industrial Court.

In *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337, the (then) Supreme Court held that the Minister is not required to give any reasons when he exercises his discretion under s 20(3) of the Industrial Relations Act 1967 ('the Act') not to refer the representations to the Industrial Court. But the Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 was of the view that when refusing to refer representations in the exercise of his discretion under s 20(3) of the Act, the Minister is reasonably expected to give reasons for his decision. If he gives no reasons or gives inadequate reasons, it is open to the court to conclude that he had no good reasons for making the decision he did.

In this case, the Minister gave a reply in a letter to the applicant which reads as follows:

> YB Menteri Sumber Manusia telah memutuskan di bawah s 20(3) Akta Perhubungan Perindustrian 1967 bahawa rayuan tuan tidak wajar dirujukkan ke Mahkamah Perusahaan.

In my view, the Minister's reply '... bahawa rayuan tuan tidak wajar dirujukkan ke Mahkamah Perusahaan' is his reason, albeit a short one, why he did not refer the case to the Industrial Court (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 10). His reason was that he did not consider the matter a fit and proper one to be referred. The Minister had stated in his affidavit in reply that he had considered the facts surrounding the circumstances leading to the complaint the applicant made to the Director General.

The issue before the court is whether the Minister was right in refusing to refer the dispute to the Industrial Court.

Having regard to the special facts of this case, I hold that the Minister had acted upon an incorrect basis of fact thus vitiating his decision. The allegations of breach of contract of employment through the salary cut and the non-payment of salary for March 1993 are not without basis. There is no provision for a loan in the contract enabling the salary cut. Reference may be made to the case quoted in the applicant's statement of facts in the case of *Hanlon v Allied Breweries (UK) Ltd* [1975] IRLR 321 quoted in the *Unfair Dismissal Handbook* by Malcolm Mead (2nd Ed) (at pp 66 and 69) which lay down the proposition that 'it is a long recognized implied terms that there is an obligation to pay agreed wages promptly ... where the employee was not paid according to the contract, the industrial tribunal held that this entitled the employee to resign and to have her resignation treated as a constructive dismissal because the employer had repudiated a term of the contract'. See also *Adam v Charles Zub Associates Ltd* [1978] IRLR 551.

Moreover, I agree with the learned counsel for the applicant that there was a breach of mutual respect in this case. The placing of another doctor, Dr Jasbir Virik, in the applicant's room and the attitude of the nurse towards the applicant are examples of breach of mutual respect by or on behalf of the second respondent towards the applicant. This breach

destroys the relationship between them. In the book *Law of Employment* by NM Selwyn (6th Ed, 1988), the learned author states at pp 241–242:

> It will be recalled that there is an implied duty of mutual respect, therefore any action by or on behalf of the employer which runs contrary to that duty may amount to constructive dismissal. This could be the use of foul and abusive language ... making statements which destroy and seriously damage the relationship of trust and confidence which must exist between the parties.

Factors such as the non-payment of salary and breach of mutual respect are matters which the Minister should have taken into consideration and given sufficient weight to because they are relevant, and if he had done so he might have come to a different conclusion. In the light of the substantiated allegations made by the applicant, the application cannot be said to be frivolous and vexatious. The reasons of the Minister, however, did not disclose that he had directed his mind to those factors. In my view, with the short reasons that he gave, the Minister had no good reasons for making the decision he did. His reasons are inadequate. Those factors as stated earlier clearly raised a number of pertinent issues which, to my mind, ought to be properly adjudicated by the Industrial Court. In refusing to refer the representations to the Industrial Court, the Minister had overstepped the limit of his discretion and thereby had exceeded his jurisdiction. I think this is a fit and proper case for reference to the Industrial Court. Therefore, the application for the orders of certiorari and mandamus are hereby allowed with costs to the respondents.

Application allowed.

Reported by Koay Sook Kuan